2014 IL App (1st) 122575-U

FOURTH DIVISION
March 13, 2014

No. 1-12-2575

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
	)	
	)	No. 02 CR 20394 (01)
v.	)	
	)	
WILLIS REESE,	)	Honorable
	)	Dianne Cannon
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred in denying the defendant's motion for leave to file his successive postconviction petition pursuant to section 122-1(f) of the Post-Conviction Hearing Act (725 ILCS 5/122–1(f) (West 2012)). The defendant met his burden in establishing cause for his failure to bring the claim in his initial postconviction petition, and prejudice resulting from that failure.

¶ 2 The defendant, Willis Reese, appeals from the circuit court's order denying him leave to file a successive petition for postconviction relief pursuant to the Post-Conviction Hearing Act (see 725 ILCS 5/122–1(f) (West 2012)). The defendant asserts that he should have been granted

leave to file a successive postconviction petition because he presented an arguable claim that the trial judge violated his constitutional rights by answering a jury question outside the presence of either the defendant or defense counsel. On appeal, the defendant also asserts that the "automatic transfer" and the "exclusive jurisdiction" provisions of the Illinois Juvenile Court Act (720 ILCS 405/5-130, 5-120 (West 2012)) are unconstitutional. The defendant further argues that the 25-year mandatory firearm enhancement to his sentence is: (1) unconstitutional because it does not permit a trial judge to consider a defendant's age in imposing the enhancement; and (2) alternatively, unconstitutionally vague because it encourages arbitrary and discriminatory imposition of sentences without providing the trial judge with any criteria or guidelines as to how the enhancment should be imposed. For the reasons that follow, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following relevant facts and procedural history. The 17-year old defendant was charged with first degree murder for his involvement in the shooting of the victim, Kenneth "C.B." Twyman, on June 30, 2002. The defendant was arrested on July 10, 2012, on an unrelated matter. On July 15, 2002, he was transported to Area 5 where he was questioned about his involvement in the June 30, 2002, shooting. After being held at the police station overnight, on the following day, the defendant gave a videotaped inculpatory statement.

¶ 5 A. Fitness Hearing

¶ 6 On March 14, 2006, the circuit court conducted a fitness hearing to determine whether the defendant was mentally fit to stand trial. The parties offered two conflicting expert medical opinions. The State offered the testimony of expert forensic psychiatrist, Dr. Roni Seltzberg, who, pursuant to court orders, interviewed the defendant in order to determine his fitness to stand

trial. Dr. Seltzberg testified that although the defendant had low average cognitive capacity, he was not mentally retarded and was capable of abstract thought, so as to be fit to stand trial. On the other hand, the defendant's expert psychologist, Dr. Michael Stone, testified that the defendant was not fit to stand trial because his IQ score placed him in the mild mental retardation range, and other tests revealed that he was not capable of malingering. Dr. Stone concluded that given the degree of the defendant's cognitive impairment, the defendant was not fit to stand trial.[1] After hearing the testimony of both experts, the trial court found the defendant fit to stand trial.

¶ 7 B. Motion to Suppress

¶ 8 On April 26, 2006, the defendant moved to suppress his statement to police, alleging that: (1) he did not have the intellectual capacity to understand and waive his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1996); and (2) that his statement was obtained as a result of psychological and mental coercion.

¶ 9 At the suppression hearing, the parties first relied on the testimony of their experts, with

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[1]Dr. Stone also testified that the medical reports he reviewed indicated a general consensus among the defendant's prior treating mental health professionals regarding the defendant's upbringing and his general level of emotional difficulty. These reports all indicated that the defendant suffered the trauma of maternal drug addiction, the death of his father, at age two, the split-up of the family, foster care, where the defendant was abused, learning and emotional difficulties, alcohol and drug addiction (particularly cannabis and PCP) and a variety of disorders, depending upon the evaluator (including, attention deficit, hyperactivity, personality, depression, suicide ideation, behavioral acting out, and/or impulse disorders).

Dr. Stone testifying that the defendant could not meaningfully have waived his *Miranda* rights, and Dr. Seltzberg averring that he could and did.

¶ 10 The State next called Detectives John Trahanas and Peter Best, who interviewed the defendant at Area 5 on July 15, 2002. Detective Trahanas testified that at about 6 p.m. together with his partner Detective Best, he was assigned to pick up the defendant at the Cook County Department of Corrections and transport him to Area 5 police headquarters. Detective Trahanas testified that prior to transporting the defendant, he advised the defendant of his *Miranda* rights and the defendant indicated that he understood them.

¶ 11 Detective Trahanas further testified that once at Area 5 headquarters, at about 7 p.m., he offered the defendant food. The interview began at approximately 7:30 p.m. and lasted about 20 minutes. According to Detective Trahanas, Detective Best started the interview by reading the defendant his *Miranda* rights. The defendant indicated he understood those right, and that he wished to waive them and speak to the police. Detective Trahanas then informed the defendant about the shooting and told him that they had already charged the defendant's cousin, codefendant, Chevelle Richardson, in the matter. Detective Trahanas also told the defendant that codefendant Richardson had identified the defendant as an accomplice. Detective Trahanas testified that at this point he and Detective Best left the interview room.

¶ 12 According to Detective Trahanas, at about 8:30 p.m. the detectives returned to the interview room only to give the defendant water and a sweater because he was cold. About an hour later, at about 9:25 p.m., Detective Trahanas heard the defendant knocking on the door of the interview room asking "to speak to someone." Detectives Trahanas and Best returned to the

room and re-*Mirandized* the defendant. During this portion of the interview, the detectives showed the defendant the beginning of codefendant Richardson's video statement to police. The defendant, however, denied his involvement in the shooting, and the detectives left the station for the evening.

¶ 13 Detective Trahanas testified that the next morning at about 11 a.m., he returned to Area 5 to interview the defendant again. At about noon, Detective Trahanas contacted the Felony Review Unit of the State's Attorneys's Office, and left for the day.

¶ 14 Detective Trahanas stated that throughout his dealings with the defendant, the defendant never indicated to him or to Detective Best that he did not wish to speak to them or that he wanted an attorney. Detective Trahanas acknowledged that during the interview he told the defendant that he "knew the defendant was the shooter," but denied telling the defendant that "all the evidence pointed at him." The detective also denied ever telling the defendant that he was "going to be charged anyway," so he "might as well give a statement and put it on tape."

¶ 15 Detective Best testified consistently with the testimony of Detective Trahanas. In addition, he stated that at about 3:40 p.m. on July 16, 2004, he interviewed the defendant together with Assistant State's Attorney (ASA) Ray Regner. According to Detective Best, the defendant waived his *Miranda* rights, and signed a videotaped consent form before giving his videotaped statement to the ASA.

¶ 16 After the State rested, the defendant testified on his own behalf. The defendant stated that he was 17 years old at the time of his arrest, that up to that point, he had only finished eight grade, and that all of his classes in school had been learning disability classes. The defendant

stated that when Detectives Trahanas and Best came to Cook County jail on July 15, 2002, to pick him up, they told him that they were taking him to Area 5 so that the defendant could appear in a physical lineup. The defendant told the detectives that he did not wish to go, but eventually "went along." The defendant stated that he was handcuffed behind his back and then placed in a police vehicle. The defendant testified that the detectives first drove him to an alleyway, where they asked him whether he was familiar with the location. When the defendant indicated that he was not, they told him "not to play with them," that "they had statements," that "all the evidence pointed at him," and that his "a** was going down."

¶ 17 The defendant next testified that he was taken to the police station where he was placed in a small interview room and handcuffed to a pole connected to a bench on which he was sitting. The defendant testified that the police threatened him and said that he should admit his involvement in a shooting. The detectives told the defendant that an attorney would be appointed to represent him, and the defendant initially requested an attorney. The defendant repeatedly told the officers that he was not involved in the shooting, but they continued to pressure him to admit his guilt. According to the defendant, the detectives showed him a statement made by Sije Richardson, codefendant Richardson's niece, and told him that "he would be in trouble if he did not say what was in the statement." The detectives also showed the defendant a videotape of codefendant Richardson's confession. The defendant testified that after viewing Richardson's entire videotaped confession, he "lost all hope," because all the stories the detectives were telling him before now seemed "believable." He therefore agreed to give a videotaped statement admitting to the crime.

¶ 18 The defendant stated that the detectives told him "everything" he was supposed to say on

the videotape. In addition, the detectives instructed him to act remorseful on the tape because the jury or the judge would be sympathetic to him and he would "get a lighter charge." As the defendant explained his decision to make the statement:

> "I just knew if I got on tape, this will make these people leave me alone, and I thought I was going to be all right. I didn't know what to think. I was confused. I didn't know what to think. I just know they was bombarding me with a whole bunch of questions and allegations that I never did."

¶ 19 On cross-examination, the defendant was asked whether it was true that when the detectives left the room, he knocked on the door and asked to speak to them. The defendant responded that he never knocked on the door because he was handcuffed. He further explained that he was moved from the interview room only once to go to the bathroom, and that this happened because he became upset and was crying and had kicked over a soda can the detectives had given him.

¶ 20 After hearing the evidence of all the witnesses, the circuit court denied the defendant's motion to suppress his statement. In doing so, the circuit court explained:

> "There is not one scintilla of evidence that [the defendant] was ever coerced or promised anything or threatened in any way or did not give this because, as he put it, he lost hope. He lost hope after he saw on a videotape that his friend, rappie [*sic*], codefendant, had implicated him in the crime.
>
> Having lost that hope, he decided to tell his version, and he did it on videotape after being advised of his rights."

¶ 21 C. Jury Trial

¶ 22 In March 2006, the defendant was tried for attempted aggravated kidnaping and first degree murder in a simultaneous but separate jury trial with codefendant Richardson. The parties called over 20 witnesses at trial. For purposes of brevity, we only summarize the relevant evidence here.

¶ 23 Officer Lester Fliger testified that at approximately 11 p.m. on June 30, 2002, he proceeded to the scene of the shooting at 5344 West Bloomingdale Avenue. Once there, the officer observed the victim on the front porch of a nearby residence. Officer Fliger identified two potential witnesses, Hazel Butler and Clifton Jones, and canvassed the crime scene, retrieving a nine millimeter cartridge nearby.[2]

¶ 24 Hazel Butler testified that she was sitting on her porch at 5344 West Bloomingdale Avenue on the evening of June 30, 2002, when she saw a maroon car with two individuals inside pull up across the street. She saw a man walk towards the car while talking to the man in the passenger seat. Butler turned her head for a moment, before she heard two gunshots. She then saw the man who had walked towards the car run, and the maroon car drive off. Butler spoke to the police when they arrived on the scene and accompanied them on a drive around the neighborhood looking for the maroon car. Butler testified that she could not see the occupants of the car and was therefore incapable of providing a description or making an identification of the car's passengers. On July 14, 2002, Butler was shown a Polaroid photograph of a car and stated

[2]Forensic scientists testified that this cartridge was not fired by the gun later retrieved from the defendant.

that it "looked like" the vehicle she witnessed at the scene of the crime.

¶ 25 Officer Molda testified that at approximately 4 p.m., on July 10, 2002, he conducted a traffic stop on a red Dodge vehicle near 2301 West Pulaski Road because the vehicle had a broken window. The defendant was the only occupant and the driver of the vehicle. As Officer Molda approached the vehicle, he observed a silver nine millimeter handgun on the drivers' side floor board. Officer Molda arrested the defendant and recovered the nine millimeter handgun, which had five live rounds in it. Officer Molda identified the red car in the photograph that was shown to Butler as the red Dodge that the defendant was driving at the time of the traffic stop.

¶ 26 Officer William Moore, who impounded the Dodge Stratus in which the defendant was arrested, testified that he discovered red stains on the interior of the passenger-side door and a compact disc recovered from the vehicle. Although it was determined that the red stains were blood, Davere Jackson, an expert in DNA analysis, testified that none of the blood was that of the victim; rather the bloodstain on the door was codefendant Richardson's blood, and the blood on the compact disc was that of the defendant. Forensic scientists who examined the impounded vehicle, including the fabric from the passenger seat headrest, also testified that they found no gunshot residue and no latent prints suitable for comparison inside the car.

¶ 27 Cook County Assistant Medical Examiner Dr. Adrienne Segovia, who performed the autopsy on the victim, testified that the defendant died as a result of two gunshot wounds, one which entered the right side of his back and exited on the left side of the abdomen, and the other, which entered the inner portion of his left arm. Dr. Segovia also testified that during the autopsy she recovered a slightly deformed, medium caliber copper jacketed bullet in the outer portion of

the victim's forearm. Forensic scientists, however, could neither conclusively identify or exclude the gun recovered from the defendant's car as the source of that bullet fragment.

¶ 28 Codefendant Richardson's niece, Sije Richardson, next testified that on July 2, or July 3, 2002, the defendant told her that he had shot someone by the name of C.B. but that he was not sure whether or not C.B. was dead. Sije knew C.B. to be the victim, Kenneth Twyman. She had also learned from an aunt that C.B. was dead. On July 14, 2002, Sije gave a written statement to the police.

¶ 29 Detective Trahanas testified that after he spoke to Sije, he went to pick up the defendant from the Cook County Correctional facility, where he was being held in an unrelated matter. The detective further testified consistently with his testimony at the defendant's suppression hearing.

¶ 30 ASA Regner next testified that he was present when the defendant made his inculpatory statement to police. He testified that he advised the defendant of his *Miranda* rights and then had a 40-60 minute conversation with him, after which the defendant agreed to have his statement videotaped. The defendant's videotaped statement was then played to the jury.

¶ 31 In that statement, the defendant told police that about 10 or 11 a.m., on June 30, 2002, he was at the home of his cousin, codefendant Richardson, watching a movie. The movie involved large sums of money, and the defendant told his cousin that he wished he had that much money. Codefendant Richardson then informed the defendant that he had a friend named Cliff who "had a problem with a fellow named C.B." and that Cliff was going to get someone to kill C.B. for $5,000. When codefendant Richardson said this, the defendant said, "Cool. For $5,000, yeah."

¶ 32 According to the defendant's videotaped statement, he and codefendant Richardson then

took the defendant's car and drove to a currency exchange to meet Cliff. At the currency exchange, codefendant Richardson introduced the defendant to Cliff, who said he had "a nice piece of change for them" if they killed C.B. and "dumped him in an incinerator." The defendant and codefendant agreed to kill C.B. in exchange for $5,000, and Cliff told them he would contact codefendant Richardson by telephone once he knew where C.B. was. The defendant spent the afternoon at codefendant Richardson's girlfriend's house, drinking and smoking marijuana.

¶ 33 In his videotaped statement, the defendant further stated that at about 10:30 p.m., codefendant Richardson received a telephone call, after which he told the defendant that "it was time." The two drove off in the defendant's red Dodge Stratus to where C.B. would be. According to the defendant, codefendant Richardson had a chrome nine millimeter handgun with him. When they arrived at C.B.'s location, the defendant stopped the car and codefendant Richardson exited the car and went over to talk to C.B. After about a minute, codefendant Richardson returned and called C.B. over to the car. According to the defendant, codefendant Richardson was sitting in the front passenger side and the defendant was in the driver's seat. Codefendant Richardson passed the handgun to the defendant and the defendant put it under his shirt. C.B. walked up to the passenger side of the car, and codefendant Richardson shook C.B.'s hand through the open window. According to the defendant, codefendant Richardson was "trying to get C.B. to go for a ride with them," but "C.B. smelled something fishy" and tried to back away. Codefendant Richardson then grabbed C.B. with both hands, and the defendant pointed the gun at C.B.'s chest and pulled the trigger. He told the police that he fired the gun four times into C.B.'s "chest area" and that C.B. fell down. The defendant panicked and drove off. The defendant dropped codefendant Richardson off, and then drove to his girlfriend's home.

¶ 34 In his videotaped statement, the defendant further averred that later that evening, at about 11:45 p.m., he called codefendant Richardson from a pay phone, and Richardson told him that he had the money, and that they should meet on North Avenue near some shopping malls. When the defendant met Richardson, Richardson gave him $1,000.

¶ 35 The defendant also told police that he returned the gun to codefendant Richardson after he shot C.B., and that on the following day, he washed the inside and outside of his car. The defendant also acknowledged that a few days later he spoke to codefendant's niece, Sije, in Garfield Park and asked her if she knew whether C.B. was dead. The defendant also told Sije that he and Richardson had shot C.B.

¶ 36 After the State rested, the defendant testified on his own behalf. The defendant denied his involvement in the murder, denied speaking to Sije, and said he obtained the gun found in his car on July 4, 2002. The defendant testified in detail about how the police obtained his confession. His testimony at trial was consistent to his testimony at the motion to suppress hearing. In addition, the defendant told the jury that after he watched codefendant Richardson's videotaped statement, he did not know what to do because he could not understand "why his cousin would say the things he did on tape." He stated that he was crying and shaking and that he told the detectives who interviewed him that he "did not do anything." When Detective Best told the defendant that he was going to be locked up and that it was better for him to do what codefendant had done and make a videotaped statement confessing to the crime, the defendant explained that he "was so upset that he just wanted to get it all over with," and agreed.

¶ 37 According to the defendant, Detective Best explained to him how the murder occurred

and he repeated the story back to Detective Best, with the detective "interrupting to correct any mistakes and telling him how he should say it." After the defendant went through the statement with Detective Best, the ASA videotaped his statement.

¶ 38 The defendant also testified that he repeated the story that the police gave him, and not just what codefendant Richardson had said in his own videotaped statement. The defendant identified several discrepancies between the statement the police directed him to give and codefendant Richardson's videotaped statement. For example, the defendant pointed out that it was the police who told him to state that he was watching a movie involving large sums of money with his cousin on the morning of the shooting, and that this information was not in codefendant's confession. Similarly, the defendant testified that information about codefendant Richardson supplying the gun came from the detectives and not from codefendant's videotaped statement. The defendant finally noted that the police told him to say that he shot the victim in the chest, when in fact the autopsy revealed that the victim was shot in the back and arm.

¶ 39 As part of his case-in-chief, the defendant also called Dr. Stone, who testified consistently with his testimony during the pretrial motions, that the defendant was mildly mentally retarded, with an IQ of 60.

¶ 40 In rebuttal, the State called Dr. Seltzberg, who testified consistently with her testimony at the defendant's fitness hearing. Dr. Seltzberg specifically stated that she watched the defendant's videotaped confession and that it appeared to her that the defendant had no trouble communicating with the ASA. On cross-examination, Dr. Seltzberg, acknowledged, however, that an IQ of 70 falls in the upper end of the mild mental retardation range.

¶ 41 In rebuttal the State also called Detective Best, who denied playing codefendant Richardson's tape in its entirety for the defendant. Detective Best stated that he did not tell the defendant to cry on tape and denied showing the defendant a copy of Sije's written statement. Detective Best also testified that prior to the defendant's videotaped statement the medical examiner had performed the victim's autopsy and the police were aware that the victim had been shot in the back and arm, rather than the chest.

¶ 42 On cross-examination, defense counsel attempted to impeach Detective Best with several early police reports, which provided a contradictory version of the victim's injuries, indicating that the victim was "twice, fatally shot in the chest." Detective Best admitted that, just as the defendant had stated in his confession, these early police reports, indicated that the victim was shot in the chest, and not in the back as was revealed by the autopsy report. Detective Best reiterated, however, that prior to his interview with the defendant, he was aware that the victim was in fact shot in the back.

¶ 43 Finally, over defense counsel's objection, during rebuttal, the State was permitted to play codefendant Richardson's entire videotaped statement, implicating the defendant, to the jury. The trial court instructed the jury that the statement was being introduced into evidence only to rebut the defendant's testimony that he derived some of his confession from codefendant's videotaped statement, and that the jury could not consider it for the truthfulness of the statement itself.

¶ 44 In closing argument, defense counsel argued that codefendant Richardson, and his niece, Sije, lied to the police and falsely implicated the defendant as the shooter. Further, defense

counsel argued that the detectives who interviewed the defendant combined Sije's and codefendant's statements to coerce the defendant into giving a false confession. Counsel pointed out that the detectives told the defendant that the victim was shot in the chest and that the defendant relayed that erroneous detail in his videotaped statement to the police. Counsel argued that if the defendant had actually shot the victim, he would have known that the victim was shot in the back, and not the chest. Defense counsel also pointed out that at the time of his confession the defendant was only 17 years old and that he was mildly to moderately mentally retarded, under either Dr. Stone's or Dr. Seltzberg's evaluations, so that he was easily manipulated.

¶ 45 After deliberations, the jury found the defendant not guilty of attempted aggravated kidnaping but guilty of first degree murder. The jury further found that during the commission of the offense the defendant personally discharged a firearm that proximately caused the victim's death, and that the defendant committed the murder pursuant to an agreement by which he was to receive money in return for the crime. Based on the jury's findings, the circuit court subsequently sentenced the defendant to natural life in prison.

¶ 46 E. Posttrial Proceedings

¶ 47 The defendant challenged his sentence on direct appeal, arguing that his mental retardation and youth were not properly considered in mitigation. This court disagreed, and affirmed the defendant's conviction and sentence in an unpublished order entered on September 23, 2009. See *People v. Reese*, No. 1-07-1681 (unpublished order pursuant to Illinois Supreme Court Rule 23) (September 23, 2009).

¶ 48 On February 5, 2010, the defendant file a *pro se* petition for postconviction relief,

alleging that: (1) his trial counsel was ineffective for, *inter alia*, failing to adequately investigate and examine discovery documents prior to his suppression hearing, so as to establish that the defendant's confession was coerced; (2) his appellate counsel was ineffective for failing to raise numerous issues on appeal, including trial counsel's ineffectiveness on the aforementioned ground; and (3) his trial counsel was biased against him.[3] The circuit court summarily dismissed the defendant's postconviction petition, and we affirmed that dismissal. See *People v. Reese*, No. 1-10-1547 (unpublished order pursuant to Illinois Supreme Court Rule 23) (September 30, 2011) (*leave to appeal denied*, 963 N.E.2d 251).

¶ 49 Subsequently, on April 18, 2012, the defendant filed a *pro se* motion for leave to file a successive postconviction petition, attaching his successive petition to that motion. In his successive petition, the defendant only made one argument--that the trial court engaged in an *ex parte* communication with the jury in violation of his right to due process. Specifically, the defendant asserted that during deliberations, the jury sent a note to the trial judge asking whether they were allowed to consider the defendant's age "at the time of the crime and his subsequent charge as an adult." According to the successive postconviction petition, outside of the presence of either the defendant or his counsel, the trial judge answered the jury: "He was an adult under the law at the time of the offense." The defendant alleged that this answer was incorrect and

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[3]In support of his *pro se* petition, the defendant attached, *inter alia*, numerous pages of transcripts from his suppression hearing and his trial. None of these pages referenced the alleged *ex parte* communication that the defendant subsequently complained of in his motion for leave to file his successive postconviction petition, the denial of which he appeals here.

severely prejudiced him.

¶ 50 As part of his motion for leave to file his successive postconviction petition, the defendant also explained that he could not have raised his claim earlier (either in his direct appeal, or as part of his original postconviction petition) because he "was not present at the time" and "could not [have] know of the judge answering the jury's question." The defendant asserted that he learned of the *ex parte* communication from his appellate counsel, but only after his first postconviction petition had already been denied. The defendant specifically asserted that he never received the pages of the transcript from his trial revealing the *ex parte* communication between the judge and the jury, and that the transcript that he did receive did not include those pages.

¶ 51 In support of his motion for leave to file his successive postconviction petition, the defendant attached: (1) an affidavit, swearing to the trutfullness of the aforementioned facts; and (2) the page of the transcript from his trial revealing the content of the alleged *ex parte* communication, namely the jury note and the trial judge's response.

¶ 52 On June 6, 2012, the circuit court denied the defendant's motion for leave to file his successive postconviction petition finding that the petition was "frivolous and patently without merit." The defendant now appeals.

¶ 53 II. ANALYSIS

¶ 54 On appeal, the defendant first asserts that the trial court erred in denying his motion for leave to file his successive postconviction petition because he presented an arguable claim that the trial judge violated his right to due process and a fair trial by answering a jury question

outside his presence and that of his defense counsel. For the reasons that follow, we agree.

¶ 55 We begin by noting the well-established principles regarding postconviction proceedings. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a means by which a defendant may challenge his conviction for "substantial deprivation of federal or state constitutional rights." *People v. Tenner*, 175 Ill. 2d 372, 378 (1997); *People v. Jones*, 213 Ill. 2d 498, 503 (2004); see also *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). A postconviction action is a collateral attack on a prior conviction and sentence and " 'is not a substitute for, or an addendum to, direct appeal." See *People v. Simmons*, 388 Ill. App. 3d 599, 605 (2009) (quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994)). Proceedings under the Act are commenced by the filing of a petition in the circuit court in which the original proceeding took place. *Jones*, 213 Ill. 2d at 503. In a noncapital case, the Act creates a three-stage process. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005). At the first stage of post-conviction proceedings, the circuit court must determine whether the petition is "frivolous and patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At this stage, to proceed further, the allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). This standard presents a "low threshold" (*People v. Jones*, 211 Ill. 2d 140, 144 (2004)), requiring only that the petitioner plead sufficient facts to assert an arguably constitutional claim (*People v. Hodges*, 234 Ill.2d 1, 9 (2009)). Accordingly, the trial court may summarily dismiss a petition as "frivolous and patently without merit," only where the petition "has no arguable basis either in law or in fact," *i.e.*, "is one which is based on an indisputably meritless legal theory or a fanciful legal allegation." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009).

¶ 56 The Act contemplates the filing of only one postconviction petition. *Tenner*, 206 Ill. 2d at 392. All issues actually decided on direct appeal are barred by *res judicata*, and all issues that could have been raised in the original postconviction petition but were not are waived. *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008); see also 725 ILCS 5/122-3 (West 2012) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.").

¶ 57 Obtaining leave of court is a condition precedent to filing a successive postconviction petition. *People v. Guerrero*, 2012 IL 112020, ¶ 15; see also *Simmons*, 388 Ill. App. 3d at 605 (citing *People v. Brockman*, 363 Ill. App. 3d 679, 688-89 (2006)); see also 725 ILCS 5/122-1(f) (West 2012) ("[o]nly one petition may be filed by a petitioner under this [a]rticle without leave of the court"); see also *People v. DeBerry*, 372 Ill. App. 3d 1056, 1060 (2007) ("section 122-1(f) unequivocally requires that a defendant must obtain leave of court before filing a successive petition ***. Section 122-1(f) constitutes a procedural hurdle *** that the legislature has intentionally chosen to impose regarding such petitions" (emphasis in original.)) Pursuant to section 122-1(f) of the Act, leave of court may be granted only if the defendant "demonstrates cause for his or her failure to bring the claim in his or her initial post[]conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2004); see also *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002). "The cause and prejudice test is to be applied to individual claims, not to the petition as a whole." *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 20 (citing *Pitsonbarger*, 205 Ill.2d at 462).

¶ 58 To establish cause, defendant must identify an objective factor that impeded his ability to raise a specific claim during his initial postconviction proceedings. 725 ILCS 5/122-1(f) (West

2012); see also *Pitsonbarger*, 205 Ill. 2d at 458; *DeBerry*, 372 Ill. App. 3d at 1060; *People v. Morgan*, 212 Ill. 2d 148, 153-54 (2004). To establish prejudice, defendant must demonstrate that the error not raised in his initial postconviction proceedings so infected the trial that the resulting conviction violated due process. 725 ILCS 5/122-1(f) (West 2004); see also *Pitsonbarger*, 205 Ill. 2d at 458; *DeBerry*, 372 Ill. App. 3d at 1060; *Morgan*, 212 Ill. 2d at 154. "[B]oth elements or prongs of the cause-and-prejudice test must be satisfied in order for the defendant to prevail." *Guerrero*, 2012 IL 112020, ¶ 15.

¶ 59 We review an order denying leave to file a successive postconviction petition, based solely on the defendant's pleadings, *de novo*, and may affirm the judgment on any basis supported by the record. *Edwards*, 2012 IL App (1st) 091651, ¶ 25; see also *People v. Johnson*, 208 Ill.2d 118, 128-29 (2003).

¶ 60 In the present case, in his successive postconviction petition the defendant alleged that he was denied a fair trial by the trial judge's ex *parte* communication with the jury during deliberations. On appeal, the defendant asserts that he has satisfied his burden in establishing both cause and prejudice as to this claim, so as to be permitted to proceed with his successive postconviction petition. The State disagrees, arguing that the defendant has failed in his burden to establish either cause or prejudice.

¶ 61 The parties initially dispute the applicable standard by which we analyze whether the defendant has met his burden. The defendant asserts that he need only present "an arguable basis" for cause and prejudice, and that we must take all his well-pleaded allegations in the motion for leave to file his successive petition as true. The State, on the other hand, argues that

we need not take the defendant's allegations as true, and that we should apply the "colorable claim" standard, recently articulated by our supreme court in *Edwards*, 2012 IL 111711, ¶ 28. While we agree with the State that the defendant's burden in establishing cause and prejudice is "more exacting" than the "gist" standard for reviewing first stage postconviction petitions, we disagree that the "colorable claim" standard applies to the defendant's successive petition here. As shall be more fully articulated below, after a review of *Edwards*, we believe that our supreme court intended that the "colorable claim" standard exclusively apply to claims of "actual innocence" raised by successive postconviction petitions, which is not a claim being made by the defendant here.

¶ 62 We begin by noting that since our legislature enacted section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)) in order to codify the cause-and-prejudice standard adopted in *Pitsonbarger*, 205 Ill. 2d at 459, our courts have had difficulty determining the burden that should be imposed on a defendant in meeting the cause-and-prejudice test. In *People v. LaPointe*, 365 Ill. App. 3d 914, 923 (2006), *aff'd on other grounds*, 227 Ill. 2d 39 (2007), the Second District of this court first held that a defendant filing a motion for leave to file a successive petition need only state the "gist" of a cause and prejudice argument. *LaPointe*, 365 Ill. App. 3d at 923. On review of that case, our supreme court chose not to address the Second District's opinion endorsing the "gist" standard as the threshold for a cause-and-prejudice showing, and instead affirmed on a separate ground. See *LaPointe*, 227 Ill. 2d 39 (2007).

¶ 63 Since then our supreme court has not addressed the issue head on. Nevertheless, two years later, in *People v. Conick*, 232 Ill. 2d 132 (2008) it indirectly called into doubt the Second District's holding in *LaPointe*. In *Conick*, our supreme court considered whether the defendant

was properly assessed fees for filing a "frivolous claim" under section 22-105 of the Illinois Civil Procedure Code (Code) (735 ILCS 5/22-105 (2012)), even though he was never granted leave to file his successive postconviction petition asserting the allegedly "frivolous claim." *Conick*, 232 Ill. 2d 132. In concluding that the defendant was properly assessed the fees, our supreme court juxtaposed the "gist" standard for first stage postconviction petitions and the cause-and-prejudice standard in determining whether a defendant should be permitted to file a successive postconviction petition, stating:

> "For the purposes of section 22-105, the status of the petition as either original or successive is not significant. [Citation.] The trial court must still examine every request for postconviction relief whether it be an initial petition subject to review under the 'gist' standard ([citation]) or a proffered successive petition subject to the more exacting cause and prejudice standard ([citation.])." *Conick*, 232 Ill. 2d at 141-042.

¶ 64 Subsequent to *Conick*, our appellate courts have simply used the "more exacting" "cause-and-prejudice" test without articulating the threshold necessary for meeting that test. See, *e.g.*, *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010); *People v. Munoz*, 406 Ill. App. 3d 844, 850-51 (2010); see also *Edwards*, 2012 IL App (1st) 091651 ¶ 21 ("Generally, Illinois courts have adhered to the 'more exacting' cause and prejudice standard when assessing a motion for leave to file a successive postconviction petition.").

¶ 65 More recently, in *Edwards*, our supreme court held that when a defendant seeks to relax the bar against successive postconviction petitions on the basis of actual innocence, leave of court should be denied only where it is clear, from review of the successive petition and

documentation provided by the defendant that, as a matter of law, the defendant cannot establish a "colorable claim" of actual innocence. See *Edwards*, 2012 IL 111711, ¶ 24. Contrary to the States' assertion, in so holding, our supreme court nowhere held or implied that the "colorable claim" standard should also apply to constitutional claims raised in successive postconviction petitions. See *Edwards*, 2012 IL 111711, ¶ 24. Rather, our supreme court in *Edwards*, explicitly delineated between constitutional claims which may be raised in successive postconviction petitions on the basis of the cause-and-prejudice test and claims of actual innocence that may be filed even if the cause-and-prejudice test cannot be met on the basis of "fundamental fairness." See *Edwards*, 2012 IL 111711, ¶ 24. The supreme court specifically held that leave of court was a condition precedent to any successive postconviction petition, but that such leave should be granted to claims of actual innocence only where the defendant can establish a "colorable" claim of actual innocence. As the court stated:

> "As this court [previously] noted *** a petitioner seeking to institute a successive postconviction proceeding must first obtain 'leave of court.' [Citation.] We also made clear *** that it is the petitioner's burden to obtain 'leave' before further proceedings on his claims can follow. [Citation.] To do so, we specifically acknowledged that 'it is incumbent upon [a petitioner], by whatever means, to prompt the circuit court to consider whether "leave" should be granted, and obtain a ruling on that question.' [Citation.] Defendant not only has the burden to obtain leave of court, but also 'must submit enough in the way of documentation to allow a circuit court to make that determination.' [Citation.] This is so under either exception, cause and prejudice or actual innocence. With respect to those seeking to relax the bar against successive postconviction petitions

on the basis of actual innocence, we hold today that leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence. [Citations.] Stated differently, leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.' [Citations.]" *Edwards*, 2012 IL 111711, ¶ 24.

¶ 66 With respect to claims other than those of actual innocence, the *Edwards* decision dictates that cause and prejudice must be met before a defendant can be granted leave to proceed on them. *Edwards*, 2012 IL 111711, ¶ 24. Although *Edwards* provides little guidance as to the threshold of the cause and prejudice, it does reiterate the holding in *Conick* that successive postconviction petitions, for which a defendant must obtain leave of court, should not be evaluated under the standard applied to initial postconviction petitions. See *Edwards*, 2012 IL 111711, ¶¶ 25-29. Given this clear pronouncement from our supreme court, we hold that the cause and prejudice test is "more exacting" than the "gist" showing, and that therefore a "gist" showing is insufficient to permit the filing of a successive petition under section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)). Nonetheless, contrary to what the State would have us do, we find that in order to meet this "more exacting" test, the defendant need not state a "colorable claim" of cause and prejudice, but rather, must, as our supreme court stated in *Edwards* "submit enough in the way of documentation to allow a circuit court to make that determination." *Edwards*, 2012 IL 111711, ¶ 24. In addition, contrary to the State's position, we note that we have previously held that in reviewing a motion for leave to file a successive

petition, "all well-pleaded facts and supporting affidavits in the defendant's motion must be taken as true." *Edwards*, 2012 IL App (1st) 091651, ¶ 25 (citing *Pitsonbarger*, 205 Ill.2d at 455 (taking as true all well-pleaded facts in petitioner's pleadings)). Since nothing in *Edwards*, 2012 IL 111711, belies this position, we continued to adhere to that rule.

¶ 67 Now that we have determined the threshold standard, we turn to the facts of this case. With respect to cause, the defendant argues that in his motion for leave to files his successive postconviction petition he sufficiently alleged that he could not have made his claim earlier as he was not present during the *ex parte* communication, and did not learn of it until his appellate attorney mailed him a copy of the portion of the trial transcript containing that communication, but only after his original postconviction petition had already been denied. In support of this allegation, the defendant attached a copy of the pages missing from the original trial transcript he was given, containing the complained of *ex parte* communication, as well as an affidavit, swearing to the fact that neither he, nor his counsel were present during that communication, and that he was not given the pages revealing that communication until his original petition was denied.

¶ 68 The State responds that the record rebuts the defendant's allegations. The State asserts that because the defendant was in possession of some of the pages from the transcript of his trial, namely the page following the page containing the *ex parte* communication, he must have been in possession of the entire trial transcript, including that communication. We disagree. Contrary to the State's assertion, nothing in the record rebuts the defendant's well-pleaded assertion that at the time he filed his initial *pro se* postconviction petition he was not in possession of the entire trial transcript. The defendant swore to the veracity of this statement in his affidavit, attached to

his motion for leave to file the successive petition and specifically pointed out the page numbers that were not in his possession until after the filing and dismissal of his initial postconviction petition. What is more, the record, as it is before us supports the defendant's allegations. Specifically, the page of the trial transcript, which includes the complained-of *ex parte* communication nowhere indicates the presence of either the defendant or his counsel. Under this record, we find that the defendant has "submit[ted] enough in the way of documentation" to establish cause for failure to file his claim earlier.[4]

¶ 69 With respect to prejudice, the defendant asserts that because the evidence at his trial was closely balanced, the *ex parte* communication between the judge and jury impacted the fairness of his trial. The State acknowledges that the evidence at the defendant's trial was closely

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[4]In doing so, we reject the State's reliance on *People v. Blalock*, 239 Ill. App. 3d 830, 841 (1993) for the proposition that the defendant was obligated to attach an affidavit from his trial counsel swearing to the fact that he was not present during the *ex parte* communication. Unlike the present case, *Blalock* involved a direct appeal and the court was asked to determine whether to grant relief of a new trial based upon the record before it alone. Here, we are asked to review the defendant's pleadings, and documents attached in support of those pleadings to determine whether the defendant has successfully pleaded cause for not raising his claim earlier. More importantly, unlike in *Blalock*, where the court was asked to speculate as to counsel's presence based merely upon a trial transcript that was silent as to the presence of counsel during the alleged *ex parte* communication, here we are presented with a sworn affidavit by the defendant averring that neither he nor counsel were present.

balanced but argues that the *ex parte* communication could not have prejudiced the defendant. For the reasons that follow, we disagree with the State.

¶ 70 It is well settled that a criminal defendant has a constitutional right to a public trial, and to appear and participate in person and by counsel at all proceedings which involve his substantial rights, in order to know "what is being done, make objections, and take such action as he deems best to secure his rights and for his protection and defense." *People v. Childs*, 159 Ill. 2d 217, 227 (1994) (citing U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8). "A communication between the judge and the jury after the jury has retired to deliberate, except one held in open court and in defendant's presence, deprives defendant of those fundamental rights." *Childs*, 159 Ill. 2d at 227. An *ex parte* communication serves as grounds for a new trial only if it results in injury or prejudice to the defendant. *Childs*, 159 Ill. 2d at 228. However, "[b]ecause an *ex parte* communication between a judge and a jury deprives a defendant of his constitutional rights to be present at and to participate for his protection in a critical stage of trial, the burden is on the State to prove beyond a reasonable doubt that the error was harmless." *Childs*, 159 Ill. 2d at 228.

¶ 71 In the present case, the trial transcript that the defendant attached to his successive postconviction petition reveals the following statement made by the trial court:

> "At 9:05, I received a note. Judge Cannon, are we allowed to consider Mr. Reese's age at the time of the crime and his subsequent charge as an adult? My response is Mr. Reese was an adult under the law at the time of the offense. Judge Cannon."

Our supreme court has held that "because jury deliberations are a critical stage of trial affecting substantial rights," a defendant not only "has an absolute right to be informed of any jury

question involving a question of law," but also must be "given the opportunity to participate for his protection in fashioning an appropriate response." *Childs*, 159 Ill. 2d at 234. As already noted above in the context of cause, the record here does not reflect either that the defendant (or his counsel) were present or that the defendant was allowed to participate in fashioning a response to the jury question. Accordingly, taking into account the closely balanced nature of the evidence presented at the defendant's trial, which centered on the voluntariness of the defendant's confession--that confession being the only direct evidence of the defendant's involvement in the crime[5]--we are compelled to conclude that the trial court's *ex parte* statement, failing to instruct the jury that they could consider the defendant's age at the time of the crime, was prejudicial to the defendant. See *Childs*, 159 Ill. 2d at 225.

¶ 72 The State does not dispute that the jury was allowed to consider the defendant's age during the commission of the crime and that they should have been told so by the trial judge. Nor could they, in a case such as this where the defendant's age and IQ were central to the defense. Instead, the State speculates as to the juror's intent in asking the question, arguing that the jury's motive was merely to determine whether they could consider the fact that the defendant was being tried as an adult even though he was 17 years old. We reject the State's invitation to speculate as to matters that are not clear from the record before us. *People v. Spears*, 112 Ill. 2d 396, 409 (1986) (noting that a reviewing court should not "speculate on issues not before it,"

[5]Aside from the confession, the inculpatory evidence at trial consisted solely of: (1) the defendant's inculpatory statements to codefendant's niece Sije; and (2) the possible identification of a vehicle similar to the defendant's vehicle at the scene of the crime.

"nor attempt to metaphysically divine a jury's collective intent from a single question"). In the present case, we are unable to glean the jury's intent purely from a reading of the transcript. Accordingly, the State has failed in its burden to establish that the *ex parte* communication between the judge and jury, neglecting to instruct the jury that they could "consider the defendant's age at the time of the offense," without an opportunity for defense counsel to weigh in, did not effect the outcome of the defendant's trial.

¶ 73 For the reasons articulated above, and under this record, we conclude that the defendant has met his "more exacting" burden and established cause and prejudice as this claim so as to be permitted leave to file his successive postconviction petition. Accordingly, we hold that the trial court erred when it denied his motion for leave to file that petition, and reverse and remand for further proceedings on this matter.

¶ 74 We further note, however, that for the first time on appeal, the defendant also argues that the "automatic transfer" and "exclusive jurisdiction" provisions of the Illinois Juvenile Court Act are unconstitutional. The defendant further contends that his sentence is invalid because the mandatory 25-year firearm enhancement that was used to sentence him to natural life in prison is unconstitutional. We note that the defendant did not raise these issues in his successive postconviction petition filed with the circuit court, nor did he explain in his motion for leave to file that petition the reasons for failing to raise these issues in his original postconviction proceedings or in his direct appeal, so as to excuse their waiver. Our supreme court has repeatedly held that a defendant may not for the first time on appeal raise issues that he did not raise in his initial postconviction petition, and that we, as the appellate court, should consider such issues waived. See *People v. Jones*, 213 Ill. 2d 498, 506-509 (2005) (holding that: (1) a

petitioner could not raise an issue for the first time on appeal from the summary dismissal of his petition for postconviction relief and (2) that the appellate court is not free, as the supreme court under its supervisory authority, to excuse, in the context of postconviction proceedings, an appellate wavier caused by the failure of a defendant to include issues in his postconviction petition). What is more, the cause and prejudice test must be met as to each and every claim raised within a successive postconviction petition, and a petition will not be considered filed until the motion for leave to file it has been granted. See *Edwards*, 2012 IL App (1st) 091651, ¶ 20 ("The cause and prejudice test is to be applied to individual claims, not to the petition as a whole.") (citing *Pitsonbarger*, 205 Ill.2d at 462)); see also *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010) (a successive petition "is not considered 'filed' for purposes of section 122-1(f), and further proceedings will not follow, until leave is granted, a determination dependent upon a defendant's satisfaction of the cause-and-prejudice test."); *Edwards*, 2012 IL 111711, ¶ 24 ("A petitioner seeking to institute a successive postconviction proceeding must first obtain 'leave of court.' [Citation.]") see also *Jones*, 213 Ill. 2d at 508 (" 'A defendant who fails to include an issue in his original or amended postconviction petition, although precluded from raising the issue on appeal from the petition's dismissal, may raise the issue in a successive petition if he can meet the strictures of the "cause and prejudice test." ' [Citation.] *** [T]he proper course of action for counsel to take is to file a successive petition in which the newly found claim is properly alleged. [Citation.]"). Since here, the defendant nowhere raised these issues before the circuit court and no finding as to cause and prejudice regarding these issues has been made, we find that the issues are not properly before this court and we decline defendant's invitation to address them. See *Jones*, 213 Ill. 2d at 508.

¶ 75 III. CONCLUSION

¶ 76 For all of the aforementioned reasons, we reverse the judgment of the circuit court and remand for further proceedings.

¶ 77 Reversed and remanded.